Supreme Court, U.S.
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No. 92-1572

In The

Supreme Court of the United States

October Term, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is respondent, as the surviving spouse of a participant in a qualified profit sharing plan covered by the Employee Retirement Security Act of 1974, as amended ("ERISA"), entitled to her deceased husband's interest in the plan because the plan, the relevant ERISA and Internal Revenue Code statutory sections, specific Treasury Regulations and uniform federal court decisions all provide or hold that the surviving spouse is entitled to the deceased's entire account balance under the plan?

(2) Does an antenuptial agreement signed by the deceased and respondent eleven days prior to their marriage, which agreement did not specify the beneficiary to be designated or the effect of the waiver and did not otherwise comply with the plan language or statutory provisions governing spousal consent to waive ERISA plan benefits, constitute a valid and effective consent by respondent as the surviving spouse of the deceased under ERISA, the Internal Revenue Code, specific Treasury Regulations and the plan?

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the respondent provides her own statement of relevant facts in order to correct various misstatements and omissions in the Petition.[1]

The Court of Appeals for the Second Circuit, affirming the district court decision, held in this case that respondent, as the surviving spouse, is entitled to the entire interest of her deceased husband, David Hurwitz (the "deceased"), in the Algonquin Press, Inc. Employee Profit Sharing Plan (the "Plan") -- under the provisions of the Plan itself, ERISA, the Internal Revenue Code of 1986, as amended ("Internal Revenue Code" or "IRC"), and pertinent Treasury Regulations. In so holding, the Second Circuit ruled that the provisions of an antenuptial agreement executed by the deceased and respondent eleven days prior to their marriage did not constitute a valid or effective consent by respondent to waive her entitlement to surviving spousal benefits under the Plan because it did not satisfy the statutory requirements for such a consent.

David Hurwitz, the deceased, was an attorney and chief executive officer of Algonquin Press, Inc. (C.A. App. at 70). On October 5, 1990, the date of his death, the deceased was

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[1] "Pet." refers to the Petition for a Writ of Certiorari and the Appendix thereto. "C.A. App." refers to the Appendix jointly filed in the Court of Appeals.

the sole participant in the Plan, a qualified profit sharing plan subject to the provisions of ERISA and the qualified plan rules of IRC §§ 401(a) and 401(a)(11)(B)(iii) (C.A. App. at 69-70, 83). The Plan provided, in § 6.2 (d) and (e), amendments added on November 17, 1986 to comply with 29 U.S.C. § 1055 (ERISA § 205) and 26 U.S.C. § 401 (IRC), that a participant's beneficiary entitled to receive the participant's nonforfeitable accrued benefits upon death shall be the participant's spouse, and that an effective spousal consent to waive those rights is valid only if it is in writing signed by the spouse, acknowledges the effect of such waiver, and is witnessed by a Plan representative or notary public (C.A. App. at 82-83). All of the Plan documents were executed by the deceased as the trustee of the Plan (C.A. App. at 55, 61).

Prior to his marriage to respondent, the deceased had been married twice. His first wife, from whom he was divorced in 1966, is the mother of his only child, the petitioner herein (C.A. App. at 69, 71). In 1988, the deceased divorced his second wife after 20 years of marriage (C.A. App. at 71). On July 21, 1988, in connection with their divorce settlement agreement, the deceased's second wife executed a consent to waive benefits which complied with the conditions set forth in the Plan and as required under ERISA. In that same document, petitioner was designated as the beneficiary, and the

second wife expressly consented to that beneficiary designation (C.A. App. at 30-31, 71-72).

The 1988 waiver by the second wife and consent to the designation of petitioner as beneficiary complied with the provisions of the Plan, ERISA and the IRC; in the document the second wife acknowledged, "I consent to the selection of primary beneficiary indicated by my spouse in this form. I understand that I am waiving my right to a death benefit provided under the Plan(s) in accordance with Federal Law by signing this consent." (C.A. App. at 30-31, 71-72). The written designation of petitioner was signed, and contained the following acknowledgment, by the deceased:

> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by law UNLESS she/he has completed and signed the Spousal Consent below and had such Consent witnessed by a Notary Public or the Plan Administrator. (C.A. App. at 31).

Eleven days prior to their marriage, the deceased and respondent executed an antenuptial agreement which provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties ... with respect to any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the other

party, as fully as though the parties had never married..." (C.A. App. at 18).

The antenuptial agreement also provided:

> FOURTH: Nothing in this agreement shall affect...(ii) the rights of either party arising from any voluntary transfer to such party by the other party... (C.A. App. at 20).

During their marriage, the deceased neither executed a new beneficiary designation form nor asked respondent to sign a statutorily valid spousal consent, or any spousal consent at all, to an alternate beneficiary designation (C.A. App. at 72-73, 78). Indeed, during their marriage, the deceased told respondent that he intended, and the law provided, that respondent would receive all of his interest under the Plan (C.A. App. at 72). This fact, set forth by respondent in her moving papers in the district court, has never been denied by petitioner in any affidavit.[2]

The deceased and respondent were married on January 7, 1990 and lived together in her home in Larchmont, New York until October 5, 1990 when the deceased died suddenly, leaving respondent as his surviving spouse. As the result of

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[2] Respondent concurs in the district court finding that the deceased's promise and representation and respondent's expectation that she would receive these benefits are irrelevant to the determination of the case (Pet. at 21a). These facts were set forth below, and here, solely to rebut petitioner's repeated references in all courts to the alleged "unfairness" of the determinations below (See, e.g., Pet. at 8, 10a, 15a).

the antenuptial agreement, petitioner was the sole heir of property passing through the deceased's estate (C.A. App. at 69). Petitioner was appointed administrator of the estate, there being no last will and testament admitted to probate (C.A. App. at 73). Respondent consented to the appointment, reserving her rights with respect to her claim to the deceased's interest in the Plan (C.A. App. at 73).

On May 15, 1991, petitioner commenced this action against respondent in Supreme Court, New York County, seeking a declaration that he is entitled to be the sole recipient of Plan benefits. On May 23, 1991, respondent removed the action to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(a) (1988), on the ground that federal statutes (ERISA and the IRC) govern the disposition of the case. On June 4, 1991, respondent filed a counterclaim seeking a declaration pursuant to 28 U.S.C. § 2201 (1988) that she is the rightful beneficiary of the deceased's interest under the Plan and that the antenuptial agreement constituted neither a valid nor an effective consent to waive her rights under ERISA. Both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court granted respondent's motion, and the Court of Appeals unanimously affirmed.

REASONS FOR DENYING THE WRIT

I

THE PLAIN AND UNAMBIGUOUS STATUTORY LANGUAGE OF ERISA, THE INTERNAL REVENUE CODE, THE PERTINENT TREASURY REGULATIONS, AND THE PLAN LANGUAGE ITSELF ALL COMPEL THE CONCLUSION THAT THE ANTENUPTIAL AGREEMENT IN THIS CASE DID NOT CONSTITUTE AN EFFECTIVE CONSENT BY RESPONDENT TO WAIVE HER RIGHTS AS THE SURVIVING SPOUSE BENEFICIARY UNDER THE PLAN

At the threshold, it is clear that the affirmance of the grant of summary judgment was proper, both parties having moved for summary judgment and having agreed that there are no genuine issues as to any material facts. Moreover, there is no question that qualified employee benefit plan regulation is a matter of exclusive federal concern and that ERISA's preemption (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title" 29 U.S.C. § 1144(a) (1988)), is sufficiently broad to require that federal law must control the determination of this case.[3]

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[3] Although he does not appear to argue directly, as he did in the Second Circuit, that state law, and not federal law, should control or at least provide guidance (cf. Pet. at 4a-5a), petitioner argues that ERISA does not specifically address antenuptial agreements and that ERISA should

Looking first, as we must (Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987)), to the statutory language of ERISA, the Retirement Equity Act of 1984 ("REA") amendment to ERISA in 1984 was enacted for the purpose of ensuring that a surviving spouse receives survivor benefits from a retirement plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984). The REA, as further amended, establishes clear criteria for a waiver of benefits by the surviving spouse:

> (2) Each plan shall provide that an election [by a participant to waive the spousal benefit right] ... shall not take effect unless --
>
> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public . . .

29 U.S.C. § 1055(c) (1988).

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not be interpreted so as to "sweep aside the domestic relations laws of fifty states." (Pet. at 15). But, as the Second Circuit held, ERISA "does set out quite plainly the requirements for an effective spousal waiver of benefits," requirements that have not been met in this case (Pet. at 7a). The Second Circuit did not hold that these requirements could not have been satisfied in an antenuptial agreement; rather it held, as indeed it had to, that this antenuptial agreement did not conform to the statutory requirements. Plainly, the Circuit decision did not "sweep aside" all antenuptial agreements, let alone the "domestic relations laws of fifty states".

Similarly, Internal Revenue Code § 417(a) (1988) provides, in nearly identical language:

> (2) **Spouse must consent to Election.** Each plan shall provide that an election [by a participant to waive the spousal benefit right] shall not take effect unless -- (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public...

In short, under the statutes, for a surviving spouse to effectively waive and be divested of rights with respect to a qualified plan, the spousal consent must:

A. designate the beneficiary;

B. acknowledge the effect of such election by the spouse; and

C. be entered into by a spouse, i.e., after marriage.

The antenuptial agreement in this case was deficient in all three of the criteria set forth above; each of the three deficiencies standing alone would disqualify the antenuptial agreement as constituting valid spousal consent.

First, the antenuptial agreement did not contain a consent to a specific beneficiary.

Next, the antenuptial agreement did not acknowledge the effect of the election by respondent to waive benefits.

Finally, the antenuptial agreement was executed eleven days prior to the marriage between respondent and the deceased. Accordingly, it was not a consent executed by a spouse. Rather, it was signed by a "fiancee."[4]

While the statutory language is quite explicit as to the requirement of a valid spousal consent, applicable Treasury Regulations,[5] in question and answer form, further explicate the requirements and specifically speak to the issue of spousal consent in an antenuptial agreement:

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[4] Although the Second Circuit reserved judgment as to whether the antenuptial agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage (Pet. at 8a, fn. 3), the other federal cases considering this issue uniformly have held, as did the district court in this case and as do the Treasury Regulations, that the waiver must be executed after marriage i.e., by a spouse, not a fiancee, to be valid. See Pet. at 24a; see also, e.g., Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. July 6, 1992); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 (D. Kan. May 8, 1992); Zinn v. Donaldson Co., 799 F. Supp. 69, 73 (D. Minn. 1992); Callahan v. Hutsell, Callahan & Buchino, 813 F. Supp. 541 (W.D. Ky. 1992); Treas. Reg. 1.401(a)-20 Q&A 28.

[5] By application of Reorganization Plan No. 4 of 1978 (43 Fed. Reg. 47713), Treasury Regulation § 1.401(a)-20 has the force of interpreting both the spousal consent requirement of the Internal Revenue Code and the spousal consent requirement of Title I of ERISA. Under § 101 of the Reorganization Plan, the Secretary of the Treasury has jurisdiction over the subject matter addressed in these regulations. Therefore, under § 104 of the Reorganization Plan, these regulations apply when the Secretary of Labor exercises authority under Title I of ERISA.

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> . . . .
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32(a) **Application.** In the case of a defined contribution plan...a participant may waive the spousal benefit of section 401(a)(11) (B)(iii) if the conditions of paragraph (b) are satisfied...
>
> (b) **Conditions**...Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. § 1.401(a)-20.

Moreover, the Plan, §§ 6.2(d) and (e), as amended on November 17, 1986 to comply with 29 U.S.C. § 1055 of

ERISA, 26 U.S.C. § 401 of the IRC, and the REA amendments, provides:

> (d) The Beneficiary of the death benefit payable pursuant to this Section shall be the Participant's spouse. Except, however, the Participant may designate a Beneficiary other than his spouse if:
>
> (i) the spouse has waived his or her right to be the Participant's Beneficiary, or
>
> (ii) the Participant has no spouse, or
>
> (iii) the spouse cannot be located.
>
> * * *
>
> (e) Any consent by the Participant's spouse to waive any rights to the death benefit must be in writing, must acknowledge the effect of such waiver, and be witnessed by a Plan representative or a notary public. (C.A. App. at 82-83).

Thus, the statutes (ERISA § 205(c) and IRC § 417(a)), the Treasury Regulations (§ 1.401(a)-20), and the Plan language itself all demonstrate that the appropriate spousal consent to waive does not exist in this case, that respondent has not consented to another beneficiary, and that respondent is entitled to all of her deceased husband's interest in the Plan.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS. TO THE CONTRARY, ALL OF THE FEDERAL CIRCUIT AND DISTRICT COURTS THAT HAVE CONSIDERED THE EFFECT OF ANTENUPTIAL AGREEMENTS HAVE HELD THAT THEY DO NOT CONSTITUTE EFFECTIVE WAIVERS OF SURVIVING SPOUSES' RIGHTS TO DEATH BENEFITS UNDER ERISA

Every federal case considering the issue has determined that antenuptial agreements which do not comply with the carefully-drawn waiver requirements spelled out in ERISA § 205(c), IRC § 417(a) and Treasury Regulations § 1.401(a)-20, do not constitute effective surviving spousal consents to waive plan benefits. See Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. 1992) at 6-7, unpublished opinion (provisions of antenuptial agreement did not satisfy spousal consent requirements to waive spousal benefits under ERISA); Zinn v. Donaldson Co., Inc., 799 F. Supp. 69, 73 (D. Minn. 1992); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 at 12-13 (D. Kan. 1992) (same); Callahan v. Hutsell, Callahan & Buchino, 813 F. Supp. 541 (W.D. Ky. 1992) (same).

Contrary to petitioner's assertion (Pet. at 8-10) that there are "conflicts in principle" between (sic) decisions of the Second, Sixth and Seventh Circuits, the federal courts have

been uniform in holding that a current, surviving spouse cannot consent to waive his or her entitlement to post-death benefits under ERISA except by a consent in writing that satisfies all of the carefully-drawn statutory requirements. Petitioner's citation of McMillan v. Parrott, 913 F.2d 310 (1990) in the Sixth Circuit and Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (en banc), cert. denied, 498 U.S. 820 (1990) in the Seventh Circuit, is totally misplaced. Neither of those decisions involves an antenuptial agreement; both concern divorced spouses as to whom the explicit ERISA non-waiver rules intended to protect surviving spouses do not apply. Most importantly, neither case involves the statutory provisions which are controlling in this case.

The issue in the Fox Valley case was whether a divorced spouse who had been designated as a beneficiary prior to divorce may still receive death benefits despite a waiver in the divorce settlement agreement. As the Second Circuit indicated in commenting on the inapplicability of Fox Valley to this case, a divorced spouse is not protected by these ERISA statutory provisions and thus validly can waive benefits

without complying with the statutory requirements that apply to current spouses[6] (Pet. at 14a).

Petitioner's reliance on McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990), is similarly in error, if not misleading. McMillan does not even remotely suggest that a current spouse's statutory right to death benefits can be waived or otherwise compromised unless the spouse consents thereto in a manner fully consistent with the strict ERISA and IRC statutory requirements. In McMillan, the only issue presented to the court was the determination of the proper beneficiary of benefits as to which the ERISA and IRC spousal benefit rule did not apply. In McMillan, the surviving spouse was entitled under the specific kind of ERISA plans involved to only half the proceeds in the absence of a valid waiver. The district court had granted partial summary judgment and awarded the surviving spouse all of the proceeds of the ERISA plans that were owing to her under the federal spousal benefit rule (i.e., 50% of the account balance), notwithstanding the fact that the designation on file with the plan administrator indicated that another person (a former spouse) was entitled to this portion of the proceeds. McMillan, supra,

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[6] Moreover, petitioner's attempt to equate ERISA treatment of current spouses with ERISA treatment of divorced spouses totally ignores the statutory protection afforded divorced spouses when the divorce settlement provides for a qualified domestic relations order ("QDRO"). 29 U.S.C. § 1056(d)(3); IRC § 401(a)(13)(B).

913 F.2d at 311. That part of the district court ruling was not even appealed to the Sixth Circuit. What was appealed and what is the sole subject matter of the Sixth Circuit's decision in McMillan is the effect of a beneficiary designation filed with the plan administrator on the portion of plan proceeds that was not governed by the spousal benefit rule in a situation in which the plan participant had subsequently indicated an intent to change such beneficiary designation. Id. In the case at bar, which deals with a profit sharing plan described in IRC § 401(a)(11)(B)(iii) and ERISA § 205, all the proceeds of the plan are subject to the spousal benefit rule. Consequently, the Sixth Circuit decision in McMillan is inapposite.

In addition, the McMillan holding presupposes an effective beneficiary designation; in the case at bar, the designation of petitioner as beneficiary under the Plan was ineffective as against respondent because it was by its own language as well as by operation of law subject to the proviso that the surviving spouse would be the beneficiary unless the appropriate spousal consent form was obtained. Indeed, in a case arising two years later, the Sixth Circuit did not even cite to McMillan in holding that both a prenuptial agreement and an ineffective beneficiary designation did not constitute a valid

spousal waiver. Howard v. Branham & Baker Coal Co., supra.[7]

III

PETITIONER'S REMAINING ARGUMENTS ARE WITHOUT MERIT

A. The Beneficiary Designation Upon Which Petitioner Relies is No Longer Valid and is Not Binding on Respondent

Petitioner asserts that he is entitled to the proceeds of the Plan by virtue of the beneficiary designation signed in 1988 in connection with the deceased's divorce from his second wife (Pet. at 11). But, as the statutory language makes clear, that beneficiary designation is not binding upon respondent. ERISA and the IRC both mandate that such a consent is not

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[7] The only case that reached a decision contrary to the circuit and district court holdings in this case, and all of the other federal cases, is an intermediate state appellate decision, In re Estate of Hopkins, 214 Ill. App. 3d 427, 574 N.E.2d 230, appeal denied, 141 Ill. 2d 452, 580 N.E. 2d 115 (1991), which held, relying on a misreading of Fox Valley, that an antenuptial agreement did operate as an effective waiver of spousal benefits under ERISA (Pet. at 13a-14a, 27a). As the courts below held in the instant case, Hopkins was erroneously decided because it disregarded ERISA's explicit requirements for waiver by a current surviving spouse (holding in effect that it was irrelevant that the antenuptial agreement was signed before marriage, and holding that the Treasury Regulations cited above were erroneous or in any event not binding) (Pet. at 13a-14a, 27a). Furthermore, the Hopkins case interpreted the waiver requirements as they existed prior to the time that the statute was amended to require that the spouse's consent include a designation of beneficiary. Thus, the Illinois court was attempting to apply a predecessor statute to the one which the Regulations were promulgated to interpret.

binding on a subsequent spouse. As ERISA § 205(c)(2) provides:

> Any consent by a spouse (or establishment that the con-sent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

IRC § 417(a)(2) contains an identical provision.

Similarly, Treasury Regulation § 1.401(a)-20 also provides that if a participant's spouse consents to a waiver of a benefit (as the deceased's second wife did in this case), a subsequent spouse, i.e., respondent, is not bound by such consent:

> Q-29: If a participant's spouse consents under § 417(a)(2)(A) to the participant's waiver of a survivor annuity form of benefit, is a subsequent spouse of the same participant bound by the consent?
>
> A-29: No. A consent under § 417(a)(2)(A) by one spouse is binding only with respect to the consenting spouse.

Finally, the consent and the beneficiary designation on which petitioner relies contains an express acknowledgment signed by the deceased that:

> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by law UNLESS she/he has completed and signed the Spousal Consent below and has had

such Consent witnessed by a Notary Public or the Plan Administrator.

Similarly, the Plan language specifically states that the surviving spouse is the one who shall receive benefits under the Plan. See supra, p. 11 of this brief.

B. The Internal Revenue Service Regulations Constitute a Reasonable Interpretation of the Statute, and Accordingly Should be Followed. Indeed, These Regulations Provide Strong, Directly-On-Point Support for the Decisions Below in This Case

Treasury regulations "'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes'" and "'should not be overruled except for weighty reasons.'" Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948)). The "'choice among reasonable interpretations is for the Commissioner, not the courts.'" Commissioner v. Engle, 464 U.S. 206, 224 (1984) (quoting National Muffler Dealers Assn., Inc. v. United States, 440 U.S. 472, 488 (1979)).

All three Treasury Regulations relevant to this matter are contained in Regulations § 1.401(a)-20. They are directly on point, are entitled to great weight, and establish that there has not been an effective waiver or consent in this case. The first, Q and A-28, supra, specifically provides that consent in an antenuptial agreement or similar contract entered into prior

to marriage does not satisfy the consent requirements of IRC §§ 401(a)(11) and 417. Q and A-29, supra, covers the situation in which a spousal consent has been signed by a spouse who predeceases or divorces the participant (as it was by the deceased's second wife in this case), and provides that such consent is binding only upon the consenting spouse, and not upon a subsequent spouse. Finally, Q and A-32, supra, makes it clear that, as the statutes provide, a waiver and consent "must state the specific nonspouse beneficiary who will receive such benefit."

These regulations have been specifically upheld by the Circuit and the District court in this case and also by the courts in Nellis v. Boeing Co., supra, 1992 U.S.Dist LEXIS 8510 at *5 and Zinn v. Donaldson Co., supra, 799 F. Supp. at 73. It is clear that the regulations in this case are neither unreasonable, plainly inconsistent, nor in the least bit inconsistent with the statutory language. The plain language of the statute permits consent or waiver only by a "spouse", not by a fiancee. Moreover, the specific statutory language involved in the pertinent ERISA and IRC sections mandates that a spousal consent by a prior wife is not binding upon a subsequent spouse. See ERISA § 205(c)(2)(A) and IRC § 417(a)(2).

Petitioner cites to Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) and contends that "[t]he regulation should not be given weight because it constitutes a drastic interference with

the states' powers to regulate domestic relations where the words of the statute do not require such interference." (Pet. at 22). However, this contention overlooks the broad reach of ERISA's preemption clause, under which pension plan regulation is made an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, supra, 481 U.S. at 44-46. Furthermore, Hisquierdo itself held that, under the Supremacy Clause of the Constitution, a state was precluded from applying its community property rules to award a divorcing wife an interest in certain federal statutorily-protected retirement benefits. Hisquierdo v. Hisquierdo, supra, 439 U.S. at 591.

Petitioner's hyperbolic claim that the regulations abrogate all antenuptial agreements and thereby "sweep aside the domestic relation laws of fifty states" (Pet. at 15) misconstrues both the scope and impact of such agreements. Clearly, whether or not antenuptial agreements are binding on ERISA benefit plans, antenuptial agreements and the state domestic relation laws regulating such agreements have broad applications to all non-benefit assets. Further, an antenuptial agreement such as the one in this case preserves the right of each party to dispose of that party's property in the manner he or she chooses. In this case, the deceased did nothing to change the entitlement of his surviving spouse to the plan benefits upon his death. The beneficiary designation signed prior to the execution of the antenuptial agreement became

null and void upon his remarriage, as the designation form and the Plan documents both provide with unmistakable clarity. The antenuptial agreement did not designate a beneficiary for any benefits payable after death, nor did the deceased take any steps, after his marriage to respondent, to designate petitioner as the beneficiary of any post-death benefits. Under these circumstances, petitioner's position appears to rest on the misguided notion that an antenuptial agreement should act as an absolute bar to the receipt by the surviving spouse of any property from the deceased spouse.[8]

C. The Antenuptial Agreement Does Not Contain a Specific Beneficiary Designation Nor Does It Conform to the Limited Exception to That Requirement

Petitioner asserts that the antenuptial agreement complied "with the intent" of the general consent requirement of Section 205(c)(2)(A)(ii) of ERISA (Pet. at 19) and faults the courts below for "insist[ing] on literal compliance with the terminology of the statute." (Pet. at 17). This desperate argument flies in the face of the clear Congressional intent to protect spousal rights and to limit waivers of such rights to the circumstances described in exacting detail in the statute.

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[8] Indeed, as previously noted, see, supra, p. 9, fn. 4 of this brief, the Second Circuit was able to find, as indeed it had to, that this antenuptial agreement did not conform to the ERISA statutory requirements, even though the Court reserved judgment as to whether an antenuptial agreement could under any circumstances satisfy the statutory waiver requirements.

As quoted above, under Section 205(c)(2)(A) of ERISA, in order to be effective, not only must a spousal consent acknowledge the effect of such election on the spouse (a requirement set forth in Section 205(c)(2)(A)(iii)), but the election by the participant to which the consent relates must also "designate a beneficiary . . . which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse)." ERISA § 205(c)(2)(A)(ii). In other words, under the statute, in order for a waiver to be effective, the spouse must not only understand that he or she is relinquishing a statutory right to a plan benefit, but must also make an informed choice regarding the identity of the party who will receive the benefit in his or her stead. The reason for this last requirement is quite obvious: a spouse might very well be willing to relinquish plan rights in favor of a particular individual, such as a child, but not to others.

Recognizing this, the statute sets forth the general rule, i.e., an election is not valid unless there is a specific beneficiary designation. A very limited exception to this rule is created by the parenthetical clause of Section 205(c)(2)(A)(ii), under which a spousal consent will not be invalid for failure to specify a beneficiary, if, and only if, the spouse acknowledges that he or she could have limited the consent to a

particular beneficiary, but instead has decided to give a general consent. The Report of the Committee on Finance of the United States Senate accompanying H.R. 3838, S. Rep. No. 313, 99th Cong., 2d Sess. (1986), at p. 1098, explains this rule as follows: Under the statute, "a spouse's consent to waive [his or her rights] is not valid unless the consent (1) names a designated beneficiary who will receive any survivor benefits under the plan . . . or (2) acknowledges that the spouse has the right to limit consent only to a specific beneficiary . . . and that the spouse voluntarily elects to relinquish . . . such right."[9]

Neither the antenuptial agreement nor any other document executed by respondent meets this simple and clear statutory requirement. Petitioner cannot point to any instance where respondent consented to a specific beneficiary designation or acknowledged that she has the right to limit her consent to a specific beneficiary and nonetheless voluntarily elects to relinquish such right. Consequently, in addition to the other reasons set forth, the purported waiver of respondent's rights to the plan benefits is ineffective for failure to satisfy Section 205(c)(2)(A)(iii) of ERISA.

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[9] See also Joint Committee on Taxation, Explanation of Technical Correction to the Tax Reform Act of 1984 and Other Recent Tax Legislation at pp. 216-217 and Treas. Reg. § 1.401(a)-20, Q&A 31 which explain this rule in the same way.

D. The Legislative Intent/Legislative History Arguments

Petitioner strives to avoid the plain meaning of the ERISA and IRC spousal waiver statutes by contriving a version of legislative intent and history which he claims is thwarted by the decisions below (Pet. at 17). However, the legislative intent and legislative history of the ERISA and IRC spousal waiver sections are inapplicable in view of the clear, unambiguous and unmistakable language of the statutes. Furthermore, even if the legislative intent and history were to be deemed applicable, they uncontrovertibly support the decisions reached below.

1. Legislative Intent and History are Inapplicable

Where the language of a statute is unambiguous, a court should not resort to legislative history in interpreting it. This Court's recent holding in West Virginia University Hospitals, Inc. v. Casey, ___ U.S. ___, 111 S. Ct. 1138, 113 L.Ed. 2d 68, 83 (1991) is illustrative:

> [T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. (Citations omitted).

Petitioner does not and indeed cannot point to any phrase of the relevant statutes which is even remotely ambiguous. The language of the statutes is microscopically clear in meticulously setting forth the three-part test for a valid spousal waiver. Petitioner instead resorts to legislative history, not for its proper use of resolving ambiguities, but rather to piecemeal together a version of Congressional intent which petitioner claims is frustrated by the decisions of the courts below.

This Court's holding in Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n, ___ U.S. ___, 111 S. Ct. 1156, 1163, 113 L.Ed. 2d 95, 106 (1991) is controlling in the case at bar. In that case, the Court considered whether an exemption of a carrier from the antitrust laws and "all other law" included a carrier's legal obligations under a collective-bargaining agreement.

> As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." The contested language . . . is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history. . . (Citations omitted).

This Court, in reversing the Court of Appeals in Norfolk, once again emphasized that a court should not

analyze the legislative history when the contested language of the statute is clear, broad and unqualified. Since the language of the statutes at issue in the case at bar is patently clear, broad, unqualified and unambiguous, this Court should give such language its plain meaning which ineluctably leads to the conclusions reached below, namely that the antenuptial agreement does not constitute a valid spousal consent and therefore the Plan proceeds must be paid to respondent, as surviving spouse.

2. Even if Deemed Applicable, Legislative Intent and History Support the Decisions Reached Below

Even if this Court were to consider the legislative intent and legislative history of the ERISA and IRC spousal waiver sections, it should still find such intent in harmony with the result reached below.

Petitioner would have us believe that Congress never considered the impact of the spousal consent rules upon antenuptial agreements. Significantly, the spousal consent rules were introduced into ERISA and the Internal Revenue Code by the Retirement Equity Act of 1984, the same Act that incorporated the QDRO rules -- a comprehensive scheme governing pension rights at the conclusion of a marriage -- into ERISA and the IRC. See ERISA § 206(d)(3) and IRC §§ 401(a)(13) and 414(p). Clearly, then, Congress recognized the instability of the family unit and enacted specific legislation to deal with this fact of life -- particularly in the benefit

plan area, where it deemed it appropriate to do so. Moreover, in the same year that the spousal consent legislation was enacted, special legislation dealing with the gift tax ramifications of marital agreements was enacted. See IRC § 2516. Nonetheless, petitioner would have us believe that Congress did not know how to clearly draft legislation that specifically addresses the special tax and ERISA problems attendant upon marriage status changes, even though Congress had, in petitioner's view, intended to do so.

In fact, Congress' silence on this issue leads to the very opposite conclusion, namely, that Congress did not want to compromise the spousal rights that it was creating. Because Congress formulated detailed, precise spousal waiver requirements, the proper implication is that Congress did not want a spouse's right to a participant's plan benefit to be lost or otherwise compromised unless the specific requirements enumerated in the statute are met.

One possible reason why Congress chose to restrict effective antenuptial waivers was its concern not to unduly burden plan fiduciaries. Administrative ease and convenience were important goals of Congress in enacting the statutory framework. See, e.g., Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, supra, 897 F.2d at 283.

> ERISA is full of unyielding rules, designed to simplify administration. Rules have their flaws; loopholes and overbreadth, both producing unpalat-

> able outcomes in the event of unanticipated circumstances, are among them. But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation. Congress and pension plans elected to use rules rather than standards; patterns of avoidance mean that we transmute the approach Congress chose into the one it rejected. (Dissenting opinion).

See also H.R. Rep. No. 655, 98th Cong., Pt. 1 at 25 (1984) (it was important to Congress to achieve its aims without imposing unnecessary or unreasonable costs on pension plans). If antenuptial waivers were to be given effect, plan administrators would have to wade through long and, in many instances, complex documents, to determine what impact, if any, such documents have on the payment of plan benefits.

In addition, Congress might also have been concerned that creating additional exceptions to the spouse's absolute right to plan benefits would dilute its effect by unintentionally creating situations in which the spouse would really need and deserve plan benefits but would fail to receive them.[10] Stated differently, because of the significant social policies motivating the enactment of this legislation, Congress pre-

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[10] This could happen, for example, if a woman signed an antenuptial agreement at a young age, married an individual who subsequently participated in a plan for forty or so years while the spouse took care of the family at home without accruing her own pension benefit. If the husband died and the antenuptial agreement were given effect, the wife would be left with nothing.

ferred to provide augmented rights to spouses of plan participants -- even to brand-new spouses and other spouses who would not necessarily need these rights -- rather than providing more narrow relief that might leave deserving or needy spouses unprotected.

Whatever the reason, the plain fact is that if Congress had intended to limit protection of a wife's right to her husband's retirement benefits to only those benefits vesting or accruing after the marriage begins (as petitioner seems to argue)[11] or otherwise give preferential treatment to antenuptial agreements, then Congress could easily have devised a mechanism to do so. Despite its intricate safeguards regarding the form and substance of a spousal waiver, the statutes make no distinction whatsoever between benefits vesting or accruing before as opposed to after marriage and do not provide elevated status to antenuptial agreements. In light of this deafening statutory silence, it would be totally inappropriate to conclude that any such distinction should be made.

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[11] See Pet. at p. 16 ("The purpose of this legislation was to protect the benefit rights of surviving spouses who made a contribution during marriage from loss of benefits under plans built up during a marriage. S. Rep. No. 575 reprinted in 1984 U.S. Code Cong. & News [USCCAN], at pp. 2547 & 2558.") (Emphasis added). Yet the given citation, and indeed the entire Congressional Report, makes no such distinction between pre- and post-marital benefits. Nor do the statutes, or the Treasury Regulations.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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